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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 72-410

TIMOTHY CRAIG BROOKS,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

BRIEF IN RESPONSE TO PETITION FOR THE WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

I.

THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

In the last generation this Court has had entrapment under consideration in: *Sorrells v. United States*, 287 U.S. 435(1932); *Sherman v. United States*, 356 U.S. 369(1958); *Masciale v. United States*, 356 U.S. 386 (1958); *Lopez v. United States*, 373 U.S. 427 (1963); *Osborn v. United States*, 385 U.S. 373(1966); incidentally only, in *Lewis v. United States*, 385 U.S. 206(1966).

The decision below is entirely consistent with these decisions.

It has never been contended that the defense of entrapment was not properly and fairly submitted to the jury by the trial court. There has never been any contention that any evidence of past crimes was admitted during the first phase of the trial, when only guilt was in issue.

There is no contention that the rules being applied by the Georgia courts relating to the defense of entrapment are not in consonance with those applied by this court, and, for that matter, the lower Federal Courts and the courts of the other states.

Accordingly, the Petitioner fails to make the showing required by Rule 19(b). The decisions cited seem to settle any Federal question that might be said to have been decided by the Georgia courts.

Respondent concurs in what is said in the petition (p. 6) about drugs and high school and college students, but concludes that even the best intentioned attacks upon police officers tend to divert attention from the persons supplying drugs to high school and college students—even to grammar school students who have the price. This case certainly shows no offensive conduct.

Lewis v. United States, 385 U.S. 206(1966), already cited, is authority that this case does not involve any breach of privacy. The Petitioner was merely encouraged to say and do things which he was willing to say and do to and for anyone who would be interested in purchasing marijuana.

II.

THE DECISION BELOW IS NOT INCONSISTENT WITH THE DECISIONS OF THE LOWER FEDERAL COURTS AND MOST OTHER STATE COURTS, AND INVOLVES ONLY THE CONSTRUCTION OF GEORGIA LAW.

Under this heading Brooks argues that the fact that in a transaction involving a sale of drugs one acts as a "procuring agent" only prevents criminal liability from attaching and that the jury trying him should have been so instructed, relying upon certain decisions by lower Federal and State Courts, and the due process clause of the Fourteenth Amendment.

The so called "procuring agent" or "purchasing agent" theory apparently had its origin in *Sawyer v. United States*, 210 F.2d 169 (3 Cir. 1954) where Judge Hastie without giving any reason or citing any authority applied the civil law principles relating to sales to a federal law prohibiting the sale of drugs. In *Adams v. United States*, 220 F.2d 297 (5 Cir., 1955), the court followed *Sawyer* without discussion. In *Henderson v. United States*, 261 F.2d 909 (5 Cir., 1958) the court (one dissenting) purported to follow *Sawyer* and *Adams*, but stated in immediate conjunction that since the defendant acted at the instigation of a government agent she shared his immunity.

In truth, all that *Sawyer* stands for is that the federal law under which the prosecution was had was strictly construed and so construed to authorize a conviction all elements of a sale, including a consideration moving to the defendant, must be proved. *Adams* and *Henderson* stand for no more. In *Henderson* the court apparently

seeks to introduce an immunity theory, but a reading of the decision discloses that entrapment was the turning point.

The correct view of the matter commences with the elementary proposition that under the police power of a state, it can constitutionally prohibit the buying, selling, or possession of drugs, or any act in furtherance of either.

Further, the construction of a state law is for the courts of the state. See *Perez v. Campbell*, 91 S.Ct. 1704 (1971).

In *Lewis v. United States*, 337 F.2d 541, 119 U.S. App. D.C. 145(1965) the federal decisions are collected and the court points out that other Federal laws in the drug field have been given a broader construction than that in *Sawyer*, *Adams*, and *Henderson*. In a footnote (n. 4, 337 F.2d at p. 543) it is said that "The purchasing agent theory, rather than constituting a defense—derives from a defendant's right to an instruction on all elements that must be proved to establish the offense charged."

The decisions by state appellate courts cited by applicant construe the term "sale" in the Uniform Narcotic Drug Act. It appears from these cases that the term is given a strict construction by the courts of Massachusetts, New York, and Texas, and a broad construction by the courts of Arizona, Illinois, New Jersey and North Dakota.

The Georgia Court of Appeals has simply adopted a broad construction of the term "sell" in the Georgia Drug Abuse Control Act (Ga. Code Ann., Sec. 79A 907 (b)).

The dissenting judges recognized that Ga. Code Ann., Sec. 26-801, is in pari materia. This section provides, in pertinent part:

"26-801. *Parties to crime; punishment.*—(a) Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime.

"(b) A person is concerned in the commission of a crime only if he: . . . (3) intentionally aids or abets in the commission of the crime; . . . ."

These same dissenters did not, apparently, recognize that the requested instruction upon the "defense" of "procuring agent" severely limited the application of the provision as to persons aiding and abetting in the selling.

In summary, we have only a matter of statutory construction here, which is for the Georgia Courts.

III.

NO SHOWING OF MAJOR IMPORTANCE TO SECURE NATIONAL RIGHTS AND UNIFORMITY OF JUDGMENT IS MADE BY PETITIONER.

Petitioner states by way of conclusion that "some state courts still give spotty regard to the courts pronouncements (in the *Sorrells* and *Sherman* cases, heretofore cited). As we have already stated in substance, the lower Federal Courts and the state courts appear to be in accord with these decisions.

CONCLUSION

The writ should not be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carter Goode, hereby certify that I have this day deposited three copies of the within and foregoing brief in response to petition for the writ of certiorari in a United States mail box, with first class postage prepaid, addressed to Albert M. Horn, Esq., counsel of record for Timothy Craig Brooks, petitioner, at his address of record, Suite 822, 15 Peachtree Street, N.E., Atlanta, Georgia 30303.

This ____ day of December, 1972.

CARTER GOODE
Of Counsel for State
of Georgia